

The Cy Pres Doctrine in Wisconsin

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COMMENTS

THE CY PRES DOCTRINE IN WISCONSIN

The doctrine of *cy res*, which is used by the courts of equity to save a charitable trust which would otherwise fail, has traveled a rocky road in the state of Wisconsin. The supreme court has transversed from expressed refutation of the doctrine,¹ to implied acceptance or use of substitute doctrines to reach similar results,² and finally to outright acceptance of the doctrine.³ During the course of this journey, the court has taken questionable routes by way of decisions which were clearly contrary to the general trend of the law⁴ and has encountered difficulty in following preferred routes indicated by the directory statutes enacted by the legislature.⁵

In this comment the doctrine of *cy pres*, as recognized by the majority of jurisdictions and the leading authorities on the subject, will be broadly set forth followed by a historical analysis of the doctrine as it has been interpreted in the decisions of the Wisconsin Supreme Court. An attempt will be made to correlate these two so as to produce a basis for speculation as to what is the current attitude of the Wisconsin court towards the doctrine.

ORIGIN OF THE DOCTRINE OF CY PRES

The term *cy pres* is generally held to have its origin in the Norman French expression "*cy pres comme possible*" and literally translated means "so near"⁶ or "as near as possible."⁷ If pronounced under the rules of pronunciation governing the language of its origin, the proper pronunciation would be as if it were spelled "see pray."⁸ Anglicization of the term would logically result in it being pronounced as if spelled "sigh press," but the common practice in the United States is to mix

¹ *Ruth v. Oberbrunner*, 40 Wis. 238 (1876); *Heiss v. Murphy*, 40 Wis. 276, 292 (1876). The doctrine of *cy pres* "... is a doctrine of prerogative or sovereign function, and not strictly a judicial power"; *Will of Fuller*, 75 Wis. 431, 44 N.W. 304 (1890); *McHugh v. McCole*, 97 Wis. 166, 72 N.W. 31 (1898).

² *Webster v. Morris*, 66 Wis. 366, 28 N.W. 353 (1886) (*cy pres* recognized as existing under certain limited conditions); *Dodge v. Williams*, 46 Wis. 70, affirmed 1 N.W. 92 (1872) (use of doctrine of equitable conversion to avoid prohibition against charitable trusts of realty); *Harrington v. Pier*, 105 Wis. 485, 82 N.W. 354 (1900) (*cy pres* available "... as the term is found used in regard to those liberal rules of judicial construction applied by courts of equity to charitable trusts ..."); *Estate of Briggs*, 189 Wis. 524, 208 N.W. 247.

³ See *Estate of Bletch*, 25 Wis. 2d 40, 130 N.W. 2d 275 (1964).

⁴ See *Tharp v. Seventh Day Adventist Church*, 182 Wis. 107, 195 N.W. 331 (1923).

⁵ Wis. STAT. §§231.11(7) (b), (c), and (d) (1963).

⁶ See OXFORD ENGLISH DICTIONARY, *cy pres*.

⁷ *Ironmongers Company v. Attorney General*, 10 Cl. & F. 908, 922 (1844).

⁸ BOGERT, TRUSTS AND TRUSTEES, §431 (2d ed. 1964).

the French and the English pronunciations with the result that it is pronounced "sigh pray."⁹

Although there are opinions to the effect that the doctrine originated or was applied as early as the third century in Rome before Constantine,¹⁰ it is clear that the greater development of the doctrine was effectuated by the English Chancery court in the Middle Ages. This extensive use of the doctrine by the Chancellors was logical due to the fact that the majority of the gifts to charity were in aid of religion and a strong ecclesiastical influence was exerted upon the medieval equity law by the clerical judges.¹¹

The doctrine, as exercised in England during this period, was divided into two separate and distinct branches or categories. The first of these was judicial cy pres:

Under this doctrine, the courts attempt, in part at least and nearly as practicable, to carry out the testators' intention.¹²

Judicial cy pres in this traditional form is the only branch of the doctrine now expressly recognized in the United States and it will be this form of the doctrine which will be more fully analyzed. But, the other original branch of the doctrine, to wit, prerogative cy pres, must be mentioned for it contributed greatly to the courts' confused rejection of the doctrine in toto for a number of years in Wisconsin.

The prerogative doctrine of cy pres is described by Scott as follows:¹³

Under the prerogative doctrine, the Crown as *parens patriae*, was permitted in certain cases to apply the property for any charitable purpose it might select. The King, in the exercise of this prerogative power, was under no duty, save perhaps moral duty, to consider what would probably have been the wishes of the testator. He would indicate in writing over his signature or sign manual the disposition which he wished to be made of the property, and the chancellor would thereupon order that disposition to be made.

It was the courts' confusion between the two types of cy pres, and its recognition that the application of the prerogative cy pres doctrine was inimical to the attitudes of the citizens living under a democratic form of government that contributed greatly to the initial total rejection of the doctrine in the United States.

⁹ *Ibid.*

¹⁰ 3 STORY, EQUITY JURISPRUDENCE, §1518 (14th ed. 1918).

¹¹ BOGERT, *supra* note 8, at 393: "Medieval equity law developed under ecclesiastical influence. Many of the ancient gifts for charity were donations in the aid of religion. It was natural that the clerical judges should struggle to save gifts for the benefit of the religious institutions."

¹² 4 SCOTT, SCOTT ON TRUSTS, §399.1 (2d ed. 1956).

¹³ *Ibid.*

But, even in England, the exercise of prerogative cy pres was limited generally to two classes of cases:¹⁴

1. Where the purpose to which the property was to be applied was illegal, but would have been charitable except for this illegal nature.
2. Where the purpose to which the property was to be applied was not designated nor was a trustee appointed to administer the property, but the property was given directly "to charity."

The first of these instances is illustrated in the famous case of *Da Costa v. De Pas*¹⁵ which involved a gift to a forbidden or illegal society. The society here was one to foster the reading of the Jewish law and instruction in the Jewish faith, which at that time was illegal as against the state established religion. The King, under the exercise of the power of prerogative cy pres, directed the fund to be applied to instruct children in the Christian faith. It was this arbitrary and capricious use of the prerogative cy pres which the early courts of the United States feared and which, due to a failure of the courts to distinguish between the two distinct branches, prompted the court to reject the doctrine in all forms.

The second class of cases giving rise to the application of the doctrine of prerogative cy pres in England, where property is given to charity generally and no one is named as trustee to select a particular charity and administer the property, would probably today call for the application of judicial cy pres in most jurisdictions in the United States and result in the court appointment of an administrator and approval of a scheme for the distribution of the property.¹⁶ This is true despite the fact, discussed more fully later in this comment, that the technical requirements for the application of the traditional doctrine of judicial cy pres are not truly satisfied in the general gift to charity.

APPLICATION OF THE DOCTRINE OF PREROGATIVE CY PRES IN THE UNITED STATES

Although the doctrine of prerogative cy pres as such is not recognized in the United States,¹⁷ the courts have on occasion exercised powers under circumstances which, if used in England, would have called for the operation of prerogative cy pres. The modern doctrine of judicial cy pres when used where the traditional prerogative cy pres would have been used, is most frequently used where Scott's

¹⁴ *Ibid.*

¹⁵ 1 Amb. 228, 7 Ves. 76, 2 Swanst. 487 note, 1 Dick 238 (1754).

¹⁶ SCOTT, *op. cit. supra* note 12.

¹⁷ BOGERT, TRUSTS AND ESTATES, §434, (2d ed. 1964); 4 SCOTT, SCOTT ON TRUSTS, §399.1, (2d ed. 1956); But see Will of Lott, 193 Wis. 409, 214 N.W. 391 (1927), wherein it is stated that the legislature succeeds to the prerogative of the crown.

second category of circumstances calling for the operation of the doctrine of prerogative *cy pres* are found to exist, to wit, where property was given directly to charity without a designation of the purposes to which it is to be put and without designating a trustee to administer the funds. The latter defect is cured by statutory enactments in most jurisdictions to the effect that a trust shall not fail due to the absence of an appointment of a trustee.¹⁸ The main defect in such a gift is that it is directly to charity without a designation of the specific purpose to which it is to be put. This has been cured by many courts by the doctrine of judicial *cy pres* despite the fact that the technical requirements for its application are not present. Bogert states that the more rational handling of these situations is the interpretation of the settlor's intention to have been that the trustee was to have discretion as to the use of the funds, in which case there would be no need to resort to the doctrine of *cy pres*.¹⁹

It is sometimes stated that the application of the modern doctrine of *cy pres*, as between the two traditional circumstances calling for the doctrine of prerogative *cy pres*, has been limited to Scott's second category. But it is erroneous to assume this because cases exist in the United States where the illegality of a designated purpose to which property was to be applied was held not to defeat the charitable trust.²⁰ However, these cases of a charitable trust directing the accomplishment of an illegal end will qualify for the application of the doctrine of *cy pres* only when that end would retain its charitable characteristic were it not for the illegality. Thus, although these circumstances clearly fall within Scott's first classification of when the English doctrine of prerogative *cy pres* was applicable it is evident that when the doctrine is applied in the United States, it is not an exercise of the traditional English rule of prerogative *cy pres* because the court has not acted arbitrarily but has endeavored to conform the gift to the general charitable intent of the settlor. Therefore, perhaps Scott's two classifications of when the prerogative powers of *cy pres* were applicable have only historical value and should not in themselves be utilized as a distinguishing test as to whether the prerogative or judicial power of *cy pres* is being exercised. The lack of restraint or control on the king's selection for the application of the fund should be the exclusive distinguishing element when the two powers are contrasted.

¹⁸ RESTATEMENT (SECOND), TRUSTS, §397 (1959): 4 SCOTT, SCOTT ON TRUSTS, §§397-397.5 (2d ed. 1956); *Will of Kavanaugh*, 143 Wis. 90, 102, 26 N.W. 672 (1910) "In charitable bequests no trustee need be named, as a charity will not be allowed to fail for want of a trustee."

¹⁹ BOGERT, TRUSTS AND ESTATES, §434 (2d ed. 1964).

²⁰ *Atty. General v. Vint*, 3 DeG & Sm 704 (gift to furnish inmates of penal institution with intoxicants changed by court to provide food and non-intoxicating beverages.)

Although there has been limited expression by the courts that in the United States the power of prerogative cy pres reposes in the state legislatures, this idea is rejected by both Bogert²¹ and Scott.²²

APPLICATION OF THE DOCTRINE OF JUDICIAL CY PRES
IN THE UNITED STATES

The modern doctrine of cy pres is defined somewhat differently by various authorities,²³ but generally has been stated as follows:²⁴

... it is the doctrine that equity will, when a charity is originally or later becomes impossible, inexpedient, or impracticable of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible.

The doctrine of judicial cy pres has been thoroughly analyzed and digested in the works of the various authorities on trusts. For the purposes of the following brief analysis of the doctrine, the works of Scott²⁵ and that of Bogert²⁶ will be used and, when differences arise, interrelated and compared. In addition to these two authorities, the exhaustive monograph on the doctrine of cy pres by Fisch²⁷ will also be utilized.

Generally, before the doctrine can be applied, three basic prerequisites must be met:²⁸

- a. The court must determine that the gift creates a valid charitable trust.
- b. It must be established that the intention of the charitable trust cannot be effected due to impossibility, inexpediency or impracticability of fulfillment.
- c. It must be determined that the settlor possessed a general charitable intention underlying the expressed specific charitable intention.

It is not within the scope of this article to examine the somewhat complex problem of what is and what is not a "charitable" gift or trust. Suffice to say that the doctrine is applicable only where a charitable

²¹ Note 19, *supra*.

²² Note 12, *supra*.

²³ Compare with 4 SCOTT, SCOTT ON TRUSTS, §399 (2d ed. 1956): "The principle under which the courts . . . attempt to save a charitable trust from failure by carrying out the more general purpose of the testator and carrying out approximately although not exactly his more specific intent is called the doctrine of cy pres." Also RESTATEMENT (SECOND), TRUSTS, §399 (1959): "If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor."

²⁴ BOGERT, *op. cit. supra* note 19, §431.

²⁵ SCOTT, SCOTT ON TRUSTS (2d ed. 1956).

²⁶ BOGERT, TRUSTS AND TRUSTEES (2d ed. 1964).

²⁷ Fisch, *The Cy Pres Doctrine in the United States* (1950).

²⁸ *Id.* §5.00.

trust exists and the courts will only find a charitable trust where the gift is made for a purpose which is recognized by law as charitable.²⁹ The doctrine itself will not be used by the courts to create charitable trusts out of private trusts. Bogert states the rule as follows:³⁰

Cy pres has no application to private trusts, nor does it permit a court to turn an invalid effort to create a charitable trust into an enforceable charity, or a mixed trust into one purely charitable. Before it can be applied, it must be found that the settlor made provision for a trust which had as its sole purpose the achievement of a public benefit.

The concurrent requirement that the charitable gift be in trust originally gave the courts a great deal of trouble when the gift was made directly to a named charitable organization without words of trust. The early courts held in these cases that the doctrine of cy pres was not applicable because of the absence of the trust.³¹ This strict construction has been overcome by the current judicial policy of sustaining charitable gifts whenever possible. In the majority of jurisdictions the general rule is as stated in *In re Walters Estate*:³²

. . . if it is reasonably certain that the testator intended that the bequest be devoted to a purpose for charity, even though there is no formal trust, a gift in trust will be implied.

Once the court has determined that the gift or devise is of a charitable nature, and a trust exists either by way of the expressed intention of the settlor or by implication due to the charitable nature of the gift, the second prerequisite must be met, to wit, that the intention of the settlor or purpose of the trust cannot be accomplished due to impossibility, impracticability or inexpediency. The existence of one or a combination of these three impediments to the accomplishment of the purpose of the trust may exist at the time the trust is created or may arise anytime thereafter.

The impediment of impossibility is the one more frequently encountered by the courts although this term is often used to cover situations which might more properly be labeled impracticable or inexpedient. Thus, the following situations are cited by authorities as demonstrating impossibility:

1. . . . the fund given is inadequate to accomplish any of the charitable purposes of the settlor, or limited or inefficient administration will result from the small size of the fund.³³
2. . . . [when] the income of the charitable trust is or becomes more than sufficient to achieve all the charitable objectives

²⁹ *Ibid.*

³⁰ BOGERT, *op. cit. supra* note 24, §431.

³¹ Fisch, *op. cit. supra* note 27, §5.01(a).

³² 150 Misc. 512, 269 N.Y. Sup. 400, 405 (1933).

³³ BOGERT, *op. cit. supra* note 26, §438.

named by the donor in the manner prescribed by him, cy pres is generally applied to the surplus capital or income in the discretion of the court, since there is an impossibility of using it to advance any of the charitable purposes of the settlor.³⁴

3. . . . impossibility may arise from changes in the law or in government or politics, or alteration with respect to health and disease as where a disease becomes extinct or new methods of treatments arise, or new developments in social, business or industrial life . . . [or] . . . because the class to receive the benefits becomes non-existent or a clause in the trust instrument is illegal.³⁵

Examples of "impracticable trusts," qualifying for the application of the doctrine of cy pres are many and varied but generally involve the directed application of funds or property which is insufficient or unsuitable to accomplish or facilitate the accomplishment of the intended charitable purpose of the gift.³⁶

Scott³⁷ cites situations where the specific purpose of the trust has already been accomplished as an example of impracticability. The famous example of this is the case of *Jackson v. Phillips*³⁸ where the testators intended that the corpus of the trust be applied to publicity purposes so as to create public sentiment that would put an end to slavery. While the case was under advisement the Thirteenth Amendment was adopted. The court applied the doctrine of cy pres and directed the funds be put to uses beneficial to the Negro race. But, this could easily also be classified as a situation of "impossibility."

Thus, it is apparent that the terms impossibility, impracticability, and inexpediency are not mutually exclusive as used in this context and although a distinction may be made by the courts, it is often difficult to correctly apply any *one* of these terms to a situation which the court will recognize as qualifying for the application of the doctrine of cy pres.

A distinction should be made between inconvenience or slight undesirability, on the one hand, and impossibility, impracticability and inexpediency, on the other. The former will never suffice as a basis for the courts substitution of a new scheme by the use of the doctrine of cy pres.³⁹ Thus, the dissatisfaction of interested parties with the

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Stead v. American Sec. & Trust Co.*, 173 F. 2d 650, 84 US App. D.C. 358 (1949) (devise of land unsuitable for playground changed to use proceeds to maintain public playground with tablet in memory of testator); *Lippincott Estate*, 17 Pa. D. & C. 2d 80, 9 Fiduciary 391 (1959) (trust formed for blind unable to be administered due to lack of facilities on part of trustees changed to award income to institution for blind having adequate facilities.)

³⁷ 4 Scott, *op. cit. supra* note 25, §399.2.

³⁸ 14 Allen 539 (Mass. 1867).

³⁹ BOGERT, *op. cit. supra* note 24, §439.

results of the application of the funds will not justify a change.⁴⁰ But, as the courts continue to become more aware that a charitable trust which no longer effectively accomplishes its purpose is not a service to the community, they become more ready to find impossibility, impracticability, or inexpediency so as to be able to more effectively utilize the available fund.⁴¹

The final determination which must be made by the court before the doctrine of cy pres can be applied is that the settlor had a general charitable intent which should be allowed to prevail now that the specific purpose cannot be accomplished. The doctrine may not be used to turn a narrow and particular charitable intent into a general charitable intent.⁴² The reason for this prerequisite that a general charitable intent be ascertainable before the doctrine may be invoked is that the doctrine of cy pres is grounded on the philosophy that the court is only justified in directing that the funds be applied to the accomplishment of a secondary purpose or objective when the settlor would have desired this to be done in event that his expressed specific charitable intention is frustrated.⁴³ Thus, in some jurisdictions where it is expressed by the settlor that a single specific charitable project should be aided and none other⁴⁴ or it is ascertainable from the circumstances surrounding the establishment of the trust that the settlor would have preferred that the whole trust fail if the particular purpose becomes impossible of accomplishment, the doctrine cannot be applied.⁴⁵

The majority of jurisdictions in the United States either expressly require this general charitable intent or assume it to be necessary by reason of the existing case law.⁴⁶ To date, Pennsylvania is the only state which has expressly dispensed with the requirement that a general charitable intent be ascertainable before the doctrine of cy pres may be applied.⁴⁷

The problem of determining whether or not the settlor was motivated by a general charitable intent in setting up the trust or making

⁴⁰ *Eliot v. Trinity Church*, 232 Mass. 517, 122 N.E. 648 (1919) (Interested parties dissatisfied with choice of statue under terms of trust for purpose of erecting a statue of a famous man to be placed in a designated location.)

⁴¹ *Fisch, op. cit. supra* note 27, §5.02.

⁴² *BOGERT, op. cit. supra* note 24, §431, note 16.

⁴³ *BOGERT, op. cit. supra* note 24, §436.

⁴⁴ *Ibid.*

⁴⁵ 4 *SCOTT, op. cit. supra* note 25, §399.

⁴⁶ *BOGERT, op. cit. supra* note 24, §436.

⁴⁷ PA. STAT. (Purdon 1947) T. 20, §301.10: "Except as otherwise provided by the conveyer, if the charitable purpose for which an interest shall be conveyed shall be or become indefinite or impossible or impractical of fulfillment or if it shall not have been carried out for want of a trustee or because of the failure of a trustee to designate such purpose, the court may, on application of the trustee or of any interested person or of the Attorney General . . . order an administration or distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyer, whether his charitable intent be general or specific." (emphasis added)

the gift to charity is not always an easy conclusion to arrive at. Of course, the settlor may have foreseen the possibility of the failure of his expressed particular charitable intention and expressly provided that the trust was to terminate upon this happening or that he wished the funds to be transferred by the court to a similar charitable activity or that he wished the doctrine of *cy pres* to apply. Although this obviously would make the courts task significantly easier, this is seldom the case. Thus, the courts have formulated general rules of construction to utilize in attempting to determine if the testator possessed this requisite general charitable intent. Where the settlor has provided for an alternative disposition of the property upon the occurrence of the failure of the particular purpose the doctrine is not ordinarily available.⁴⁸ But, where no gift over or reversion is expressed a general charitable intent may be presumed.⁴⁹ The fact that the bulk of the settlor's estate is directed towards charitable purposes is evidence of a general charitable intent.⁵⁰ The converse is also true.⁵¹ The courts are more inclined to find a general charitable intent where the charitable gift has once taken effect and there has been a subsequent failure than where the intent was frustrated prior to its ever taking effect.⁵² The courts have been extremely reluctant to find a general charitable intent where the object of the trust is a foreign charity although the reasoning behind these decisions is open to criticism.⁵³ The fact that the settlor has for a long period taken a personal interest in the designated charity or the scope of the effect of the charity is limited to a small locality may defeat the finding of a general charitable intent.⁵⁴ But, with the exception of gifts to foreign charities, the modern courts may be generally counted on to strive to find a general charitable intent. Thus, the fact that the trust excludes a particular use has been used to find a general charitable intent on the theory that the exclusion indicated that the settlor contemplated the failure of the particular scheme and foresaw the application of the res to the support of some other charitable purpose.⁵⁵ Also, a general charitable intent has been found despite the fact that the instrument provided that the property

⁴⁸ Fisch, *op. cit. supra* note 27, §5.03(a), note 52.

⁴⁹ *Id.* note 54.

⁵⁰ *Id.* note 55.

⁵¹ *Id.* note 56.

⁵² *Id.* note 59.

⁵³ *Id.* note 61. Fisch comments that this distinction between domestic and foreign charities may emanate from the policy of attempting to keep property within the state or country or in the administration difficulties associated with foreign trusts.

⁵⁴ BOGERT, *op. cit. supra* note 24, §437.

⁵⁵ *Gremke v. Malone*, 206 Mass. 49, 91 N.E. 899 (1910) (establishment of industrial home for colored children and "none other" and in no event for the benefit of Roman Catholics.)

be devoted "forever"⁵⁶ to the particular purpose or "to that purpose and no other purpose"⁵⁷ or where the property was given "upon condition."⁵⁸

The requirement of the finding of a general charitable intent before the doctrine may be applied upon the failure of an expressed specific or particular charitable purpose has been severely criticized. Bogert⁵⁹ notes that unless the settlor has expressly provided for disposition of the funds upon the failure of the particular purpose it is doubtful that he ever gave any thought to their disposition in event that this failure occurs. Also, that the basis for the court's determination that a general charitable intent did exist can only be arrived at from an interpretation of the donor's situation and interests and the language of the trust instrument and the fact that courts have arrived at diametrically opposite conclusions in cases involving similar facts prove the unsatisfactoriness of the search for this general intent. Also, the requirement that a general intent be ascertainable causes much expensive and time consuming litigation. Bogert's solution to the problem is stated as follows:⁶⁰

Instead of continuing the present rule, it would seem preferable to provide that the charitable intent shall be presumed to be general, unless the settlor expressly negates the application of cy pres; or to follow the Pennsylvania precedent and make cy pres applicable whether the settlor's charitable intent was found to be general or special.

After the court has determined that the three basic prerequisites have been satisfied, it may proceed to apply the doctrine of judicial cy pres to save the charitable trust. Whether the court's determination that these basic prerequisites qualifying the trust for the operation of the doctrine are themselves part of the doctrine or only a necessary finding prior to the application of the doctrine is an academic question. Suffice to say that once the court has found that the prerequisite conditions exist it will proceed to direct the application of the property to some charitable purpose which the court believes is "as near as possible" to that originally designated by the settlor. There are no set rules to govern the choice of this secondary purpose but, unlike the method used by the king under the doctrine of prerogative cy pres, the court is duty bound to attempt to evaluate what would probably have been the wishes of the settlor.⁶¹

⁵⁶ Fisch, *op. cit. supra* note 27, §5.03(a), note 69.

⁵⁷ *Id.* note 70. See also *Fairbanks v. City of Appleton*, 249 Wis. 476, 24 N.W. 2d 893 (1946) (property given on condition that it be used to create the trust fund "for no other purposes except the uses and purposes outlined herein.")

⁵⁸ Fisch, *op. cit. supra* note 27, §5.03(a), note 71.

⁵⁹ BOGERT, *op. cit. supra* note 24, §436.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

AN APPARENT ANOMALY—THE GIFT “TO CHARITY”

As heretofore noted, a gift generally “to charity” will not fail due to the lack of a trust because the trust will be imposed by implication.⁶² Similarly, the failure to appoint a trustee to administer a trust is not fatal. But, gifts such as these have been held to be void on the ground that they were too indefinite or vague for the court to enforce.

The leading authorities now hold that such trusts should not fail and that the court should approve a scheme to carry out the settlor’s general charitable intentions.⁶³ Although it is sometimes held that these gifts “to charity” may be sustained by the exercise of the doctrine of judicial cy pres, it is clear that if the requirements for the application of the doctrine are strictly enforced such a gift or trust does not qualify. The fact that gifts of this type may not meet the first requirement that a valid charitable trust be created due to existing statutes requiring a certain degree of definiteness and certainty should not be a valid objection to the application of the doctrine because the primary objective and purpose of the doctrine is that trusts which express or reflect a settlor’s charitable intention should be saved and not defated by technicalities. But the second requirement that the intention of the charitable trust cannot be effected due to impossibility, inexpediency or impracticability is not technically satisfied and can be met only by a most liberal extension of the meaning of these terms. And, the third requirement that the settlor possessed a general charitable intention underlying the expressed specific charitable intention, although admittedly satisfied as to the existence of the general charitable intention, is not applicable because no specific intention has been expressed.

Therefore, although these gifts “to charity” are sometimes sustained under the guise of the application of the doctrine of judicial cy pres, the more correct interpretation is that these gifts may be sustained in the furtherance of public policy favoring the saving of charitable gifts whenever possible⁶⁴ and that any statutory requirements of definiteness and certainty are satisfied by judicial interpretation that a trust to charity is not vague due to the court’s power to appoint a trustee with discretion to select objects or recipients for the funds.⁶⁵

HISTORICAL ANALYSIS OF WISCONSIN

DECISIONS INVOLVING CHARITABLE TRUSTS

Although Wisconsin has now thoroughly committed itself to the recognition of charitable trusts⁶⁶ and the applicability of the doctrine of cy pres in qualifying cases involving the alleged failure of a charitable

⁶² See note 32, *supra*.

⁶³ RESTATEMENT (SECOND), TRUSTS, §397, comment e (1959).

⁶⁴ 4 SCOTT, *op. cit. supra* note 25, §397; Fisch, *op. cit. supra* note 27, §4.02.

⁶⁵ BOGERT, *op. cit. supra* note 24, §434.

⁶⁶ See WIS. STAT. §231.11(7) (1963).

trust,⁶⁷ this was not always true. Prior to 1836, what is now Wisconsin had been part of the Michigan territory. When Wisconsin became a state in 1848, it adopted much of the Michigan legislation, including the Michigan statute abolishing any uses and trusts in land except those expressly authorized elsewhere in the statute.⁶⁸ This statute as enacted by the Wisconsin legislature,⁶⁹ and which had originated in New York,⁷⁰ was used to defeat a charitable trust in the early and important case of *Ruth v. Oberbrunner*.⁷¹ This case involved a devise of the residue of an estate, including certain real estate, by a sister of the order of St. Dominican to the defendants who were of the same order, "... to hold the same in trust for the use and benefit of the order of St. Dominican and St. Catherine's Female Academy, and for no other purpose, which is located in the city of Racine in said state of Wisconsin."⁷² Neither of the intended beneficiaries were at the time of the bequest incorporated. The Wisconsin Supreme Court, committing itself to what it concluded was the controlling New York interpretation of the statute, held that the Wisconsin statute abolishing uses and trusts⁷³ had abolished *all* trusts, including those for charitable purposes, except such as were specifically authorized in that chapter.⁷⁴ Consequently, the court held it was unable to uphold a devise of real property in trust for the benefit of an unincorporated charitable association.⁷⁵ It should be noted that the *Ruth* decision was also based on the conclusion that the trust in question did not satisfy the requirements of the 5th subdivision of section 231.11 which states that a trust for the beneficial interest of another is valid "... when such trust is fully expressed and clearly defined upon the face of the instrument creating it. . . ." The court concluded that the trust in question was wanting in all the

⁶⁷ Estate of Bletch, note 3 *supra*.

⁶⁸ MICH. REV. STATS., Chapter 63 (1846).

⁶⁹ REVISED STATS. OF WISCONSIN, Chapter 57, sec. 1 (1849). See the introductory comment to W.S.A. CH. 231, by the late Oliver S. Rundell, of the University of Wisconsin School of Law for a detailed historical analysis of Chapter 231, WIS. STATS.

⁷⁰ 1 R.S. (1929) page 727, §45. In its present form it is N.Y. (McKenny 1949), *Real Property Law*, §91. The Wisconsin chapter, WIS. STATS. chapter 231, was originally taken bodily from the New York Revised Statutes by 1836 by the Michigan legislature. It was amended in 1846 by the Michigan legislature (see Chapter 63 of Michigan Revised Statutes, 1846, P.V.) by adding the fifth subdivision which was carried into the Wisconsin Statutes of 1849. This is now section 231.11(5) except the section when originally enacted did not contain its present reference to literary and charitable corporations. As enacted in 1849 it was as follows: "For the beneficial interests of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time prescribed in this title."

⁷¹ 40 Wis. 238 (1876).

⁷² *Id.* at 239.

⁷³ Note 69, *supra*.

⁷⁴ Note 69, *supra*, §§2-5.

⁷⁵ The court also held that the trust was passive but because the charitable organization designated was unincorporated the general rule that passive trusts are executed by the Statute of Uses was not operative.

elements of certainty and precision essential to give it validity⁷⁶ because these words were too general and indefinite in their meaning. The court noted that no active duty was imposed upon the trustees nor was any special purpose designated to which the income from the property was to be applied. And, the court felt that there was nothing to indicate even that the property was to be applied to a charitable purpose. This conclusion was founded on the decision that the beneficiary was a voluntary association and there was no criteria for ascertaining the nature and purpose of a voluntary society because, unlike the incorporated organization which objects, purposes and powers are defined in its charter, the purposes of a voluntary corporation may change with the will of the associates.⁷⁷ Thus the strict requirements of definiteness and certainty required by section 231.11(5) which must be compiled within the case of private trusts were deemed applicable to charitable trusts. In cases subsequent to the *Ruth* case the Wisconsin court has on occasion affirmed this aspect of the *Ruth* decision. But the *Ruth* case was decided prior to the adoption of section 231.11(7)(a) which on its face would appear to exempt charitable trusts from the requirements of 231.11(5) where a trustee or other person is given the power to designate a charitable purpose. The application of this section is illustrated in the case of *Will of Monaghan*, noted later in this comment. And, there are decision which will be noted in this comment which consider section 231.11(5) inapplicable to charitable trusts generally. Yet, there are a few other decisions involving charitable trusts decided after 1917 which do refer to section 231.11(5) giving the impression that this section is still operable when charitable trusts are at issue. Although this problem relates directly to the technical validity of a charitable trust at its inception and not to the problem of whether or not a valid charitable trust can be saved from failing due to impracticability, inexpediency or impossibility by the doctrine of cy pres, in actuality the two areas are inter-related. Thus in the following examination of the Wisconsin decisions the problem of the requirement of "certainty" under 231.11(5) and its applicability to charitable trusts will be considered whenever the courts indicate the statutes applicability or inapplicability.

The New York interpretation followed in the *Ruth* case to the effect that all uses and trusts were abolished by then existing statutes was in conformity with that expressed in the New York case in *Holmes v. Mead*.⁷⁸ In this case it was held that the statute in question abolished all uses and trusts including charitable trusts and that therefore there

⁷⁶ *Ruth v. Oberbrunner*, *supra* note 71, at 263.

⁷⁷ "They may be pious today, and impious to-morrow. There is no law to prevent or restrain such changes."

⁷⁸ 32 N.Y. 332 (1873). It should be noted that this case was decided in New York after Wisconsin had adopted the statutes therein construed.

could be no trusts of realty except as were expressly permitted by the statute. However, an earlier New York case of *Shotwell v. Mott*⁷⁹ had held that it was not the intention of the New York legislature to abolish charitable trusts. The latter decision by Sandford, then Assistant Vice-Chancellor, was based on the fact that the notes of the revisors had dealt with radical changes in the law of private trusts and had made no mention of charitable uses. Thus, by resorting to that principle of construction which dictates that the general words of a statute are to be limited to the subject matter, Sandford held that the revised statutes did not apply to charitable trusts. This decision was subsequently followed by Judge Denio in *Williams v. Williams*.⁸⁰ Although the *Shotwell* decision was later criticized,⁸¹ at the time the statute was adopted by the Wisconsin legislature in 1848 the *Shotwell* construction had not been overruled. The Wisconsin court in the *Ruth* case recognized that a construction in New York of the statute before its enactment in Wisconsin to the effect that it did not apply to charitable uses and trusts would be good grounds for holding that it was adopted by the Wisconsin legislature subject to such a construction. This, of course, is in accord with the rules of construction that decisions by courts of the state of origin construing a statute prior to its adoption by another state become an integral part of the statute when it is subsequently adopted by another state.⁸² However, the Wisconsin Supreme Court avoided this result by noting that the decision in the *Shotwell* case was by the *Assistant Vice-Chancellor* and therefore entitled only to the respect and consideration accorded a decision of a circuit judge and not that given to the decision of a court of last resort. Yet, the fact remains that the *Shotwell* decision was the controlling decision of the highest court having considered the problem at the time of the adoption of the New York statute by the Wisconsin Legislature in 1846. However, in light of the hostile attitude of the courts during this period towards charitable trusts, it is easy to understand why the court was predisposed to accept any available authority which would defeat the charitable trust.⁸³

It is this succession of cases following the decision in the *Ruth* case to the effect that charitable trusts were abolished in Wisconsin by statute where the Wisconsin Supreme Court repeatedly states that the doctrine of *cy pres* does not exist in Wisconsin. Although these expressions precluding the operation of the doctrine in Wisconsin were

⁷⁹ 2 Sandf. Ch. 46 (N.Y. 1844).

⁸⁰ 4 Seld. 525 (N.Y. 1953).

⁸¹ *Ruth v. Oberbrunner*, *supra* note 71, at 262.

⁸² See *In re Adams Mach., Inc.*, (1963) 123 N.W. 2d 558, 20 Wis. 2d 607, 621 ("It is a settled rule of construction of statutes that where a statute has received a judicial construction in another state and is then adopted by Wisconsin, it is taken with the construction which has been so given it.")

⁸³ *Fisch, op. cit. supra* note 27, §§4.00 et. seq.

often obiter dictum, it would seem that the conclusions were often founded on the failure of the courts to correctly distinguish between the judicial and the prerogative branches of the doctrine. This failure to distinguish between the branches may first be found in the *Ruth* case wherein at page 257 the court stated:

It may be admitted that this devise would be sustained in England, and by some courts in this country where the doctrine of cy pres prevails.

Since the trust in question did not involve a failure due to impossibility, impracticability or inexpediency it would seem reasonable to conclude that the court was referring to the doctrine of prerogative cy pres and not to the traditional judicial doctrine. Yet, on page 264 of the opinion the court states:

Would . . . [the court] . . . not be compelled to resort to the cy pres doctrine, establish a trust to frame a scheme to carry out the charitable intent of the testatrix, where she had no directions, and had declared in the will no charitable purpose.

It is difficult to determine from this statement exactly which branch of the doctrine the court is referring to or whether it was referring to the early common law of England which was very broad in the matter of charities, so much so that it is now fairly clear that by that law a gift "to charity" generally, without designation or mention of any particular kind of charity, or agency, was to be given effect, under the ordinary equity jurisdiction, at least if the donor raised a trust for the purpose.⁸⁴ But, this common law was not the doctrine of cy pres—judicial or prerogative, for it originated prior to the doctrines recognition in England. Nevertheless, it will be noted in subsequent cases that the *Ruth* case is the landmark decision denying the applicability of cy pres in Wisconsin and that it generally is thought that it was the prerogative branch of the doctrine which was rejected.

The holding and rationale of the *Ruth* case was cited by the court in *Heiss v. Murphy*.⁸⁵ However, the court did not choose to base its decision of the *Ruth* case. Instead, in this case which involved a will bequeathing all the testator's real and personal property to the Roman Catholic orphans of the diocese of La Crosse, with the Bishop of the diocese designated as having the powers to sell and use the proceeds for the expressed intentions, the court held the trust void for uncertainty in the description of the beneficiaries. Thus, a strict interpretation of the requirements of definiteness and certainty as required under what is now section 231.11(5) resulted in a rather tenuous holding that the term "Roman Catholic orphans" from a specified area did not adequately designate who were to be the beneficiaries of the testator's

⁸⁴ See 163 A.L.R. 784, 786.

⁸⁵ 40 Wis. 276 (1876).

bounty.⁸⁶ In this case the court rejected the doctrine of cy pres without distinguishing between its judicial and prerogative branches.⁸⁷ But it is only dicta for so long as the court refuses to recognize the validity of a charitable trust the first requirement for the application of the doctrine is not satisfied, e.g., that there exist a valid charitable trust. However, these cases do represent the hostile attitude of the courts towards charitable trusts and illustrate the inability or refusal of the court at that time to distinguish between the prerogative and judicial branches of the doctrine of cy pres. It is these two facets of the cases which survived to periodically haunt the court for nearly the following ninety years whenever the doctrine of cy pres was argued.

Three years after the *Ruth* and *Heiss* decisions, in an apparently mellower mood⁸⁸ with regard to charitable trusts, the Wisconsin Supreme Court in *Dodge v. Williams*⁸⁹ upheld a testamentary trust for the education and tuition of worthy indigent females on the ground that the power granted to the trustee to effect the sale of the testator's realty and the direction that he pay a specified sum to each of the designated educational institutions constituted an equitable conversion of the property and that both the statutes against perpetuities⁹⁰ and section 231.11 applied only to trusts of real property. The court dismissed the objection that the scheme of the charity was uncertain by holding that the designation of specific institutions as recipients of the funds cured the alleged defect. The reference to the requirement of certainty would seem to indicate that the court was still closely

⁸⁶ It would appear that under the common law rule discussed the designation of the beneficiaries in this case was more than adequate. But, this case again demonstrates the attitude of the court that the requirements of certainty applicable to private trusts under section 231.11(5) also governed charitable trusts.

⁸⁷ At page 292 of the opinion the court stated: "There are doubtless cases in which a devise or bequest to charity as vague and uncertain as the one we are considering has been sustained. But these cases mainly rest on the doctrine of cy pres, which is a doctrine of prerogative or sovereign function and not strictly a judicial power (citations omitted). It is not claimed that the courts of this state are clothed with other than the strictly judicial power, or that they have succeeded to the jurisdiction over charities which the chancellor in England exercised by virtue of the royal prerogative and the cy pres doctrine." It should be noted that the court was rejecting the doctrine of cy pres as not available to cure an alleged defect of uncertainty—a function the traditional doctrine does not perform.

⁸⁸ *Dodge v. Williams*, 46 Wis. 70 (1878), aff'd 1 N.W. 92 (1879). At page 91, after citing cases to the effect that courts should look with *favor* upon charitable trusts, the court stated: "And so it is the duty of this court to uphold the charitable bequests of the will in this case, if it can be done without violating any provisions of statute or principle of law. But, at the same time it is the duty of the court to carefully weigh the objections made against the bequest, and to give effect to any sufficient to render the bequest void in law."

⁸⁹ 46 Wis. 70 (1878), aff'd 1 N.W. 92 (1879).

⁹⁰ The court by way of dicta held that the rule against perpetuities was not applicable to charitable trusts. See also current Wis. STAT. §230.15 which now expressly excepts charitable trusts generally and §231.11(5) which apparently only excludes literary and charitable corporations organized in this state.

examining charitable trusts with regard to whether the requirements of section 231.11(5) had been satisfied although in the *Dodge* case the statute is not specifically cited. Although the *Dodge* case clearly set a precedent in favor of sustaining charitable trusts of personalty,⁹¹ the Wisconsin court did not consistently follow this lead and in a number of subsequent cases fell back upon the rationale of the *Ruth* case and held that charitable trusts were invalid under the Wisconsin statutes even though the corpus consisted of personal property.⁹²

With regard to the specific question of whether the doctrine of cy pres was available in Wisconsin, the courts continued to follow the dicta of the *Ruth* and *Heiss* cases. This refusal to distinguish between the prerogative and the judicial branches of the doctrine of cy pres was again demonstrated in *Will of Fuller*.⁹³ In that case the settlor set up a testamentary trust ". . . to aid in the support of a Baptist Colporteur and (or) missionary in the State of Wisconsin." The court held that the bequest was void on the ground that the trust was uncertain and incapable of execution. But, by way of dicta, the court stated:

At the outset it may be observed that the doctrine of cy pres, so called, is not recognized and acted upon by the courts of this state. The doctrine is enforced by the English court of Chancery, and by some courts in this country. But this court has held that the doctrine of cy pres rested on prerogative or sovereign power, and was not strictly a judicial power, and consequently the courts of this state could not enforce it. *Ruth v. Oberbrunner*, 40 Wis. 238, *Heiss v. Murphy*, 40 Wis. 276.⁹⁴

In the *Fuller* case the court's statement as to the unavailability of the doctrine of cy pres in Wisconsin follows directly upon the conclusion that the bequest in question was void due to uncertainty. Thus the court would appear to have been reasoning that if the doctrine had been available it could have been utilized to clear the uncertainty. But, as noted earlier in this comment, this was never the function of the judicial doctrine. However, the prerogative doctrine was utilized where the bequest was "to charity" and this might be considered as curing a defect of uncertainty. This explanation would substantiate

⁹¹ The *Dodge* case was followed in *Gould v. Taylor Orphan Asylum*, 46 Wis. 106 (1879); *Webster v. Morris*, 66 Wis. 366, 28 N.W. 353 (1886); *Sawtelle v. Witham*, 94 Wis. 412, 96 N.W. 72 (1879); *Beurhaus v. Cole*, 94 Wis. 617, 69 N.W. 987 (1897); *Harrington v. Pier*, 105 Wis. 485, 82 N.W. 345 (1900); *Hood v. Doer*, 107 Wis. 149, 82 N.W. 546 (1900); *Kronshage v. Varrell*, 120 Wis. 161, 97 N.W. 928 (1904); *Will of Kavanaugh*, 143 Wis. 90, 126 N.W. 672 (1910); *Maxey v. Oshkosh*, 144 Wis. 238, 128 N.W. 672 (1910).

⁹² The *Ruth* case was followed in *Estate of Hoffer*, 70 Wis. 522, 36 N.W. 407 (1888); *Will of Fuller*, 75 Wis. 431, 44 N.W. 304 (1890); *McHugh v. McCole*, 97 Wis. 166, 72 N.W. 31 (1898); *Damforth v. Oshkosh*, 119 Wis. 262, 97 N.W. 258 (1903).

⁹³ 75 Wis. 431, 44 N.W. 512 (1890).

⁹⁴ *Id.* at 435.

the conclusion that the court when rejecting the doctrine in the early cases was referring to the prerogative and not the judicial branch of the doctrine.

In 1897, in the case of *McHugh v. McCole*,⁹⁵ the court refused to enforce a trust for the benefit of two named churches on the ground that it was too indefinite and a bequest to a Roman Catholic Bishop to be applied for masses on the ground that it created a trust without any beneficiaries competent to enforce it.⁹⁶ What is now section 231.11(5) was specifically cited in the opinion as the basis of the objection of "uncertainty." The court held that unless the trusts could be executed by the court, they must fail and following the *Ruth* and *Heiss* cases the court refused to recognize the doctrine of cy pres. But, again the court implied that if the doctrine of cy pres were available it would be used to cure the alleged defect of uncertainty. As earlier indicated, this is not the function of the judicial doctrine.

It should also be noted that the strong objection of the court in the *McHugh* case and prior and subsequent cases with regard to the uncertainty problem was that no beneficiaries were sufficiently identified so as to be able to enforce the trust. It would seem that since the enactment of Wisconsin Statute section 231.34 in 1945 this argument would not be valid. Under section 231.34 an action may be brought by the attorney-general in the name of the state for the enforcement of any public trust. Thus, the danger which might exist where no beneficiary is sufficiently identified so as to be able to *enforce* the trust no longer exist and this objection by itself should no longer be grounds for the application of section 231.11(5) to charitable trusts.

It was not until 1900, in the case of *Harrington v. Pier*,⁹⁷ that the Wisconsin court for the first time clearly differentiated between the prerogative and the judicial doctrines of cy pres. The will in this case directed that three-fourths of the residuary assets be paid to two designated persons ". . . as trustees, to be by them or the survivor of them expended for temperance work in said city of Milwaukee as their best judgment shall dictate . . ." with a provision that the greater portion of the fund be used by three named organizations and that in case either of these organizations should decide to erect a building for temperance work, the trustees should so devote the entire fund, and that all of the fund should be expended within five years. The lower court held that this bequest was void for uncertainty. The Supreme Court recognized that the decision of the *Ruth* case and the *Dodge* case were irreconcilable when the device of distinguishing be-

⁹⁵ 97 Wis. 166, 72 N.W. 31 (1898).

⁹⁶ This conclusion was based on the assumption that a bequest for masses created a *private* trust. This was overruled in *Will of Kavanaugh*, 143 Wis. 90, 126 N.W. 672 (1910), which is discussed later in this comment.

⁹⁷ 105 Wis. 485, 82 N.W. 345 (1900).

tween trusts of personal property (*Dodge*) and trusts of real property (*Ruth*) was eliminated and that it was now time to choose between the two theories. The court decided that it was the *Dodge* case which correctly stated the law:

It follows that indefiniteness of beneficiaries who can invoke judicial authority to enforce the trust, want of a trustee if there be a trust in fact, or indefiniteness in details of the particular purpose declared, the general limits being reasonably ascertainable, or indefiniteness of mode of carrying out the particular purpose, do not militate against the validity of a trust for charitable purposes. The court, through its strictly judicial power, may fill the office of the trustee if necessary, the trustee can select the immediate beneficiaries or objects within the designated class and scheme; he can determine upon the details necessary to effect the intention of the donor within the general limits of his declared purpose, and execute the trust accordingly; and the proper public agencies, if necessary, can invoke judicial power to enforce such execution. At no step is the court required to exercise cy pres power in the sense of prerogative authority, or at all, except as the term is found used in regard to those liberal rules of judicial construction applied by courts of equity to charitable trusts . . . for determining the intent of the donor in creating a trust for a designated proper charitable purpose.⁹⁸

With the exception of the *Dodge* case and those cases which follow its rationale where trust of personal property were involved, the above quoted statement by the court in the *Harrington* case is the first expression by a Wisconsin court recognizing, in fact if not in name, the existence and principle of the doctrine of judicial cy pres. The court, for the first time, fully explains the origin of the confusion between the prerogative and judicial doctrines.⁹⁹ The court also apparently clarified the problem of the requirements for definiteness in charitable trusts when at page 523 of its opinion it stated:

The degree of certainty that such doctrine requires is correctly stated in *Webster v. Morris* and often since affirmed, as we have seen. That is, "The scheme of charity must be sufficiently indicated, or a method provided whereby it may be ascertained, and its object made sufficiently certain to enable the court to enforce the execution of such object. It must be of such a tangible nature that the court can deal with it. The mere direction to expend money for charitable purpose *at large* is too indefinite

⁹⁸ *Id.* at 514.

⁹⁹ The court noted that the Statute of Elizabeth was thought to be the source of *both* branches of the cy pres doctrine and that this statute had been either expressly repealed or never adopted by the original states. Thus, the court at page 503 of the opinion states: "When it is said that the doctrine of cy pres does not prevail in this state that does not refer to those liberal rules of judicial construction by courts of equity, which prior to the Statute of Elizabeth were applied in chancery, and of which such statute is only confirmatory, but to the prerogative power exercisable where such statute prevails."

to be carried into execution." 66 Wis. 391. In order not to depart from the correct line, however, the rule must be considered, not with reference to the statutory rule of certainty (sec. 2081, Stats, 1898),¹⁰⁰ or that which is required in regard to private trusts, as indicated in *Ruth v. Oberbrunner*, and perhaps in *McHugh v. McCole*, 97 Wis. 166, but with reference to those liberal rules for judicial construction, applicable to charitable trusts.

This should have settled the question of the inapplicability of section 231.11(5) to charitable trusts. But, although this portion of the *Harrington* decision has never been overruled, the court has, as shall be pointed out, in instances reverted to examination of charitable trusts under the rule of 231.11(5).

It would be thought that the lucid opinion in the *Harrington* case would also have cleared any doubts that Wisconsin, although preferring to use the term "liberal construction," definitely recognized the doctrine of judicial cy pres. And, for a number of years this conclusion was correct. Three months after the *Harrington* decision, the court in *Hood v. Dorer*¹⁰¹ sustained a provision of a will which directed that the testator's entire estate ". . . be invested in a fund provided for that purpose for the support and maintenance of the superannuated preachers of the church denominated the United Brethren in Christ . . ." as a valid charitable trust by employing the doctrine of equitable conversion as used in the *Dodge* case and the principles of liberal construction enunciated in the *Harrington* case to overcome the objection of indefiniteness and uncertainty. The court noted that if that same requirement of certainty as was used in the *Fuller* case were to be applied in this instance the provision of the will would certainly fail. However, the court correctly noted that the doctrine of the *Fuller* case insofar as it required that charitable trusts meet the standards of certainty applicable to private trusts was "substantially overruled" in the *Harrington* decision. But, it should be noted that although the court

¹⁰⁰ This is now section 231.11 of the Wisconsin Statutes. It was then, as it is now, inclusive of what is now section 231.11(5). It should be noted that when what is now section 231.11(5) was originally enacted it contained no reference to "literary and charitable corporations." What is now section 230.15 did contain the terms "literary and charitable corporations" at the time of its original enactment in 1849. It is not known at exactly what date the addition of these terms was made to section 231.11(5) but they were in the section in the R.S. 1878. Nowhere in the *Harrington* decision is this fact mentioned. Apparently the court did not deem the addition of these terms to be legislative approval of prior decisions holding that charitable trusts were subject to section 231.11(5). Section 230.15 was amended by ch. 511, Laws of 1905 to include the term "charitable use." No such amendment was made to section 231.11(5). This would tend to support the conclusion that the legislature did not feel that the term "charitable corporation" was inclusive of charitable trusts and uses and to some extent explain why the court in the *Harrington* case did not feel it was necessary to consider the inclusion of the term "charitable corporation" when it rejected the contention of applicability of section 231.11(5) to charitable trusts.

¹⁰¹ 107 Wis. 149, 82 N.W. 345 (1900).

was expressly approving the judicial doctrine of cy pres at this time it was not using it in the traditional sense for none of the cases involved a failure of a valid charitable trust due to impossibility, impracticability or inexpediency. In actuality the court was using the common law rules of liberal construction applicable to charitable trusts although it had not reached the point of accepting a trust simply "to charity."

In 1904 the *Harrington* decision was again expressly approved when the court in *Kronshage v. Varrell*¹⁰² sustained a testamentary trust set up for the charitable purpose of relieving the wants, distress and sufferings arising from storms, floods, fires and other accidental and natural causes. In assessing the *Harrington* decision, the court at page 164 of the opinion stated:

This court has decided, disregarding the reasons which some others have deemed controlling, that there are inherent in all courts all the strictly judicial powers ever exercised by the Chancellor or the High Court of Chancery of England to find means to carry into effect a charitable purpose entertained by a testator or grantor; that such courts lack only the prerogative cy pres power enjoyed by the sovereign to apply all goods devised to any charitable purposes, to purposes never declared or even entertained by the donor, under certain circumstances, which prerogative power was in some degree exercised by the Chancellor by delegation from the sovereign. All that is necessary is that the deviser shall place his property in trust, and designate a charitable purpose of his own narrower than the field of charity generally. The courts can and will then see to it that a trustee is provided, if none be designated, and that the means will be found to apply the property to the purpose, if no method be prescribed. They are limited to the defined purpose, and they must ascertain it from the words of the testator, *but in ascertaining it may and will indulge in most liberal construction.* (emphasis added).

The above quoted passage should have dispelled any doubts as to what was the attitude of the Wisconsin court towards charitable trusts and that the court reconized the classical doctrine of judicial cy pres despite the fact that the court continued to prefer to use the term "liberal construction." Yet, again we find this positive statement regarding the doctrine of judicial cy pres being made in a case where there was no apparent need for the exercise of the doctrine. However, this fact should not negate the effect of the statements.

A further clarification as to the requirements of definiteness and certainty in charitable trusts was made in 1910 in *Will of Kavanaugh*.¹⁰³ In this case, the Supreme Court held that a bequest ". . . for masses for the purpose of my father's and mother's and sister's and brother's

¹⁰² 120 Wis. 161, 97 N.W. 928 (1904).

¹⁰³ 143 Wis. 90, 126 N.W. 672 (1910).

and my own soul" with certain persons designated to direct where and when the masses were to be said did not create a private trust but a charitable trust which was valid even though the masses were designated as for the benefit of specified persons. This is because according to the doctrine of the Catholic Church the whole church profits by every mass since the prayers of the mass include all the faithful, living and dead. As to the requirements of definiteness and certainty, the court clearly held that the requirements of section 231.11(5)¹⁰⁴ only applied to private trusts:

The bequest for masses being, as we have seen, a charitable bequest and for the benefit of mankind in general, the statute relating to trusts (sec. 2081) does not apply.¹⁰⁵

Quoting from *Webster v. Morris*,¹⁰⁶ the court again set forth the degree of certainty required in charitable trusts:

The scheme of charity must be sufficiently indicated, or a method provided whereby it may be ascertained, and its object made sufficiently certain to enable the court to enforce the execution of the trust according to such scheme and for such object. It must be of such a tangible nature that the court can deal with it. The mere direction to expend money for charitable purposes at large is too indefinite to be carried into execution.¹⁰⁷

In further commenting on this requirement, the Supreme Court in the *Kavanaugh* case stated:

The certainty must be determined, not with reference to sec. 2081, Stats. (1898), or that which is required in regard to private trusts, "but with reference to those liberal rules of judicial construction applicable to charitable trusts." *Harrington v. Pier*, *supra*.¹⁰⁸

The court noted the distinction between a private and a public or charitable trust in so far so certainty is required:

In the [private trust], statutory certainty is required, while in the [public or charitable trust] it is not. The certainty of beneficiaries in cases of private trusts does not obtain in the case of public trusts. And this is necessarily so from the nature of public trust as distinguished from private trusts.¹⁰⁹

But, the court did conclude that:

Of course some degree of certainty must obtain even in a public trust. The scheme of charity must be sufficiently indicated or a method provided whereby it may be ascertained and its objects

¹⁰⁴ This is the current statute section. At the time of the decision in this case it was §2081, STATS. (1898).

¹⁰⁵ Will of Kavanaugh, *supra* note 103, at 99.

¹⁰⁶ 66 Wis. 366, 28 N.W. 353 (1886).

¹⁰⁷ Will of Kavanaugh, *supra* note 103, at 99.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

made sufficiently certain to enable the court to enforce an execution of the trust according to the scheme. (citations omitted). In charitable bequests no trustee need be named, as a charity will not be allowed to fail for want of a trustee. The person named in the will to execute the charity will be held to be the trustee, and, if necessary that he hold the title for the purposes of carrying out the provision of the will, he will be implication hold such title (citations omitted).¹¹⁰

In 1917 the Wisconsin legislature attempted to clarify the laws of charitable trust by enacting what is now Wisconsin Statute section 231.11(7) (a):¹¹¹

No trust for charitable or public purposes, whether in real or personal property, shall be invalid for indefiniteness or uncertainty where power to designate the particular charitable or public purpose or purposes to be promoted thereby is given by the instrument creating the same to the trustees, or to any other person or persons.

Although this statute should have superseded section 231.11(5) and officially settled the question as to the requirements of definiteness and certainty in charitable trusts, at least where a power to designate is conferred upon a trustee, it did not constitute legislative approval of the doctrine of judicial cy pres. In 1923, in *Thorp v. Seventh Day Adventist Church*,¹¹² the Wisconsin court recognized this fact and, in what appears to be a retrogression to the era of when a hostile attitude towards charitable trusts existed, declared that the same certainty required for private trusts as set forth in Wisconsin Stat. sec. 231.11(5) must be satisfied to sustain charitable trusts and that this lack of certainty could not be cured by application of cy pres because the doctrine did not obtain in this state. Of course this again would have been an improper application of the doctrine even if the court had decided it was available. The court held that a bequest in trust for the benefit of the "Seventh Day Adventist Church" to be paid to the "proper trustees" of the Church for the publication and

¹¹⁰ *Id.* at 102.

¹¹¹ At the time of enactment this section was WIS. STAT. §2081(7) (1917). In *Will of Monaghan*, 199 Wis. 273, 226 N.W. 306 (1929) the court was faced with a challenge to the validity of a will creating a trust and naming a professional trustee. The will provided that the trustee "... shall distribute the net income from said trust annually or oftener in its discretion to such charities or charitable corporations operating within the County of Kenosha and the state of Wisconsin as it may deem needy and worthy of aid." In deciding whether or not such a trust was void for uncertainty the court cited and quoted what is now section 231.11(7) (a) and held that it was controlling: "That amendment is conclusive of the objection to the validity of the trust. . . . There is now no uncertainty or indefiniteness in the trust under consideration, for the reason that power is given by the will to the trustee to designate the particular purpose to be promoted thereby The act of the legislature is remedial and must be liberally applied." (page 277-278 of opinion).

¹¹² 182 Wis. 107, 195 N.W. 331 (1923).

distribution of tracts and literature that teach the doctrine of the Church was void for indefiniteness in that it failed "to designate with any degree of reasonable certainty what Seventh Day Adventist Church, local or general, incorporated or unincorporated, was meant" and that this failure to designate the beneficiaries was fatal and that: "In our state the doctrine of cy pres does not obtain."¹¹³ In support of this contention, Chief Justice Vinje cited the *Harrington* case. Thus, in support of the contention that cy pres does not obtain in Wisconsin we find the court citing the first case to clear the confused state the court had been in since 1876.¹¹⁴ The *Thorp* case is clearly an anomaly in Wisconsin's trend towards the recognition and acceptance of charitable trusts and the doctrine of judicial cy pres.¹¹⁵ Strangely enough, or perhaps understandably, nowhere in the *Thorp* opinion is the provision of Wisconsin Stat. sec. 231.11(7)(a) mentioned as rebutting any contention of uncertainty. Also, this case, which categorically denies the availability of the doctrine of cy pres in Wisconsin, did not involve a situation where there was any need to invoke the operation of the doctrine for there was no failure due to impossibility, impracticability or inexpediency unless you extend the scope of impossibility to cover the fact that the court felt that the designation of the "Seventh Day Adventist Church" did not signify any specific incorporated or unincorporated religious body. To this extent the case would be similar to the *Bletch* case¹¹⁶ and the cy pres doctrine could operate to designate a particular recipient or beneficiary compatible with the expressed general intent to benefit the Seventh Day Adventist Church.

Three years after the *Thorp* case was decided the court in *Estate of Briggs*¹¹⁷ held that a bequest to the Young Women's Christian Association of Wisconsin did not lapse even though there was no organization in existence within the state which could legally take and administer the fund. The court quite correctly held that the *Harrington* analysis of the method in which charitable trusts were to be treated was directly on point and controlling. How the situation in the *Briggs* case differed from that of the *Thorp* case is hard to understand, but the court in the *Briggs* case explained that the fund here could be administered with the advice of the National Board of the Young Women's Christian Association because the policies of that organization

¹¹³ *Id.* at 112.

¹¹⁴ See Zollmann, *Cross Currents in the Wisconsin Charity Doctrine*, 8 MARQ. L. REV. 168, 172 (1924) wherein the author commented: "Just what induced the court [in the *Thorp* case] to do this [cite the *Harrington* case] is beyond the author's knowledge . . . Nothing certainly is gained by citing a case which negatives a proposition in affirmance of it."

¹¹⁵ See Zollmann, *Judge Roujet D. Marshall and the Wisconsin Charity Doctrine*, 10 MARQ. L. REV. 177 (1929) and Boyer, *Property Rights of Religious Institutions in Wisconsin*, 36 MARQ. L. REV. 329, 350-351 (1953).

¹¹⁶ 25 Wis. 2d 40. This case will be discussed in detail later in this comment.

¹¹⁷ 189 Wis. 524, 208 N.W. 247 (1926).

were uniform throughout the country, but that in the *Tharp* case "the various Church organizations were not identical in their creed, and therefore no distribution could be made without creating discord and dissatisfaction." Whether this analysis will withstand close inspection is not important for it is apparent that the court was once again in accord with the *Harrington* decision.

However, the doctrine of judicial cy pres was yet to suffer another setback on its rough road to official recognition. In *Will of Lott*¹¹⁸ the court held that where the income from a trust was to be applied to the ministers' salary of a designated church, but failed to provide for the disposition of the property in case of the failure of the trust, the corpus became the property of the parent church organization under provisions of existing statutes.¹¹⁹ By way of dictum, the court rejected the doctrine of judicial cy pres:

Considerable discussion is had of the doctrine of cy pres in the briefs of counsel. It is admitted, however, this court has refused to follow the doctrine in the exercise of its judicial powers.¹²⁰

No cases were cited by the court in support of this erroneous conclusion. In actuality, although the court was acting pursuant to what it thought was the controlling statutes, it was in effect accomplishing exactly what would probably have been done if the doctrine were applied. This was a perfect situation for the application of the traditional judicial doctrine of cy pres. In all likelihood extrinsic evidence would have supported a conclusion that the testator's general charitable intent was to aid religion, particularly the Baptist religion, and that in event of the failure of his specifically expressed charitable intent, due here to the non-existence of the designated beneficiary, the doctrine would have dictated that the funds be directed to the parent organization. The only difference would have been that the trust would have continued rather than the entire corpus being passed to the Baptist church free of the trust.

Apparently the Wisconsin legislature didn't concur with Justice Crownhart's conclusion in the *Lott* case, or felt that the law should be changed, for in 1933 it enacted legislation which has generally been recognized as the statutory equivalent of the doctrine of judicial cy pres.¹²¹ The enacted amendments to the Wisconsin Statutes Chapter 231 are as follows:

¹¹⁸ 193 Wis. 409, 214 N.W. 391 (1927).

¹¹⁹ Chapter 64, Laws of 1907.

¹²⁰ *Will of Lott*, *supra* note 118, at 414.

¹²¹ *Fisch*, *op. cit. supra* note 27, §2.02(c). But see *BOGERT, op. cit. supra* note 24, §433, page 409, note 61 wherein only §§231.11(7)(c) and (d) are cited as the statutory form of cy pres. Technically this would appear to be correct in that subsection (b) would seem to relate more to the requirements of certainty for charitable trusts.

No trust or other gift for charitable or public purposes whether in real or personal property shall be invalid because of failure of the donor to indicate the method by which the purpose of the trust or gift is to be accomplished.¹²²

In the absence of a clearly expressed intention to the contrary, no trust or other gift for charitable purposes whether in real or personal property shall be invalid because the specific method provided by the donor for the accomplishment of the general purpose indicated by him is or becomes for any reason impracticable, impossible or unlawful.¹²³

Where the fulfillment of the special purpose expressed in a trust or other gift for charitable or public purposes is or becomes impracticable, impossible or unlawful, it shall be the duty of the courts by a liberal construction of the trust or gift to ascertain the general purpose of the donor and to carry it into effect in the nearest practicable manner to the expressed special purpose. . . .¹²⁴

It should be noted that while these statutes provide for the continuation of a charitable trust in event of impracticability, impossibility or illegality, they also codify to some extent the requirements of certainty for charitable trusts. In so doing they give further credibility to the contention that section 231.11(5) is not applicable to charitable trusts. Section 231.11(7)(b) provides that the lack of an indicated *method* shall not invalidate a trust by reason of uncertainty. This is because the trustee will be held to have the discretionary power to choose the method necessary to effect the stated purpose. Subsection (c) of the statute provides that even where the designated *method* becomes impracticable, impossible or unlawful the trust does not fail. This would seem to be a necessary conclusion following upon the provisions of subsection (b). Subsection (d) probably most clearly states the traditional doctrine of judicial cy pres for it saves a charitable trust where the *purpose* becomes impracticable, impossible or unlawful and directs that the "as near as possible" rule be utilized.

As is the contention of this comment, the statutes enacted were only confirmatory of the fact that cy pres had existed in Wisconsin since 1900 when it was accepted in the *Harrington* case. This contention was stated in *First Wisconsin Trust Co. v. Board of Trustees*.¹²⁵ In this case, the court was confronted with the question of conflicting claims were to be recognized upon termination of a charitable trust created in favor of a college which had now become defunct. The court, in attempting to apply the funds to that claimant which most nearly approximated the purpose or intention of the testatrix as expressed in her will, clearly recognized that the only cy pres which

¹²² WIS. STATS. §231.11(7) (b) (1963).

¹²³ WIS. STATS. §231.11(7) (c) (1963).

¹²⁴ WIS. STATS. §231.11(7) (d) (1963).

¹²⁵ 225 Wis. 34, 272 N.W. 464 (1937).

ever was repudiated in Wisconsin was that exercised under the prerogative power.¹²⁶ The court recognized that judicial cy pres had existed since the *Harrington* case and that the amendments to Wisconsin Statutes section 231.11(7) were merely a codification of that law.¹²⁷

An interesting point is raised in the *First Wisconsin Trust Company* case by the statement made by the court at page 43 of the opinion:

There can be no doubt that the trust created for Racine college is a charitable trust within the meaning of that term as used secs. 230.15 and 231.11(5), stats, *Will of Kavanaugh* (1910), 143 Wis. 90, 126 N.W. 672.

This statement would seem on its face to lend support to those who would for one reason or another prefer to contend that charitable trusts are still subject to the same requirements of certainty under section 231.11(5) as are private trusts. This author would disagree with such a contention. It is difficult to understand exactly why section 231.11(5) was cited by the court. The court evidently was attempting to reinforce its conclusion that they were dealing with a charitable trust in the case under consideration. But, section 231.11(5) would not be an appropriate statute to cite for although this section does refer to literary and charitable corporations it does not refer to charitable uses or trusts. And, that the term charitable corporation in section 231.11(5) does not encompass charitable uses or trusts would seem to be confirmed by the fact that section 230.15, which as originally enacted¹²⁸ made reference to literary and charitable corporations, was specifically amended in 1905 to include the term "charitable uses." Further confusion results from the courts citing of the *Kavanaugh* case which is completely in accord with the *Harrington* decision on the holding that charitable trusts are *not* subject to section 231.11(5). Thus, it is contradictory to cite the *Kavanaugh* case. But, this reference by the court to section 231.11(5) in relation to charitable trusts is the most recent by the court. And, although it is to some extent unexplainable, it cannot be entirely ignored.

This recognition of the doctrine of judicial cy pres in the *First Wisconsin Trust Company* case was expressly followed in *Estate of*

¹²⁶ At page 43 of the opinion the court stated: "As pointed out in *Harrington v. Pier*, *supra*, in some of the earlier cases the cy pres doctrine was repudiated. It is quite clear that what was repudiated was the prerogative power exercised by the chancellor, not as a judge, but as a representative of the Crown."

¹²⁷ At page 42 of the opinion in referring to sections 231.11(7) (a), (b), (c) and (d), the court stated: "These amendments did little more than declare existing law."

¹²⁸ The current §230.15 was at the time of the *Kavanaugh* decision section 2039, Stats. (1898). It was amended by ch. 511, Laws of 1905 by adding the term "charitable uses" so as to except real property devised to a charitable use from the operation of that section limiting the suspension of alienation of real property. See note 100, *supra*.

*Mead*¹²⁹ when the court liberally construed the provision of a testamentary trust directing funds "for the purpose of books" to allow use of the funds for other library expenses since conditions now were such as ". . . to render use of the funds in part for other purposes more needful and beneficial to the library than to expend the whole for books alone."¹³⁰ This clearly was an exercise of the traditional power of judicial cy pres so as to allow the settlor's general intention that the community have access to a library to succeed despite the need to deviate from the settlor's specific instructions in order to accomplish this general intention.

Wisconsin has not dispensed with the requirement that a general charitable intention be ascertainable before the doctrine of cy pres may be applied. In *Nelson v. Madison Lutheran Hospital and Sanatorium*¹³¹ the settlor had subscribed \$50,000 for the purpose of erecting a sanatorium but on the expressed condition that the sanatorium be a Lutheran institution, located in Madison, Wisconsin, and that at least \$100,000 be paid by others to help defray the cost of the institution and that the offer would not be binding on deceased or his estate unless said conditions were complied with within six years from the date of the offer. When the conditions were not satisfied the court concluded that the gifts were for a specific purpose and not general charitable gifts because of the precise limiting conditions attached. In commenting on the inapplicability of cy pres to the case the court noted the requirement that a general charitable intent be ascertainable:

So far as this doctrine is recognized in Wisconsin, it is simply a doctrine of liberal construction. It applies only where a general charitable purpose can be found in the terms of a bequest or gift, and the specific purpose of the bequest or gift has become impracticable or impossible.¹³²

The court concluded that where this general charitable purpose could not be found a resulting trust arises regardless of the absence of conditions or a reverter clause.¹³³ The court also noted that the operations of Wisconsin Stat. sec. 231.11(7)(c) and (d) which are the codification of the judicial doctrine of cy pres are dependent upon the discovery of this general charitable intent.

In *Estate of Thronson*¹³⁴ the court utilized section 231.11(7)(c) and (d) so as not to allow a testamentary gift in trust to fail where the corpus was directed to be paid to the "Masonic Home at Dousman, Wisconsin" which was not a legal entity capable of taking title to the property. The court, without ever mentioning the term cy pres, held

¹²⁹ 227 Wis. 311, 277 N.W. 694 (1938).

¹³⁰ *Id.* at 331.

¹⁴¹ 237 Wis. 518, 297 N.W. 424 (1941).

¹³² *Id.* at 525.

¹³³ See RESTATEMENT (SECOND), TRUSTS, §401(1) and comment a (1959).

¹³⁴ 243 Wis. 73, 9 N.W. 2d 641 (1943).

that “. . . the nearest practicable manner for the court to carry out the testator's manifest intention that the residue be applied to the benefit of the Home perhaps would be for it to direct conveyance of it by the bank to the legal entity having title to the home in trust for the benefit of the home. . . .” and so ordered the executor to act.

Another case where the doctrine of judicial cy pres was utilized to sustain a charitable trust is *Estate of Robinson*.¹³⁵ In this case a trust, which had been adjudged impossible or impracticable of fulfillment by the lower court, had provided that when the income of the corpus accumulated to yield an income of \$6,000 a year the income was to be paid to the regents of the University of Wisconsin for the purpose of establishing a professorship under certain enumerated conditions. Due to the expense of administration by private trustees, it was apparent that the income would never reach the required amount and that heirs petitioned for distribution. Citing Wisconsin Stat. sec. 231.11(7)(d), the court ordered the trust to be administered by the Board of Regents of the University of Wisconsin so that the main purpose of the trust could eventually be realized. Citing *Will of Stack*¹³⁶ and *Estate of Thronson*, *supra*, the court stated:

. . . when it appears that if the main purpose of a will creating a trust cannot be accomplished by continuing the management of the trust according to the direction of the will but may be accomplished by deviating the management from that specified by the will, deviation should be ordered by the court having supervision of the trust in order to effect the main purpose.¹³⁷

In *Fairbanks v. Appleton*,¹³⁸ Wisconsin aligned itself with those jurisdictions which hold that the doctrine of cy pres may be applied upon failure of the specific charitable purpose when a general charitable purpose is ascertainable despite the fact that the funds are to be used for the expressed purpose and “for not other purposes.” In this case the restriction was placed on a bequest in trust to the City of Appleton “for the erection and maintenance of an Old People's Home in the city of Appleton where elderly people may go to live and enjoy the comforts of life at reasonable rates and for reasonable compensation.” The court held that where the city already had an “Old People's Home” in operation and where there was no need for another one in the city and where the funds were inadequate to establish one anyway, the doctrine of cy pres, or more specifically Wisconsin Stat. sec. 231.11(7)(d), may be used so as to allow use of the funds for “erection or maintenance, either separately or in conjunction with its present City Home, of such facilities, services, and conditions as

¹³⁵ 248 Wis. 203, 21 N.W. 2d 391 (1945).

¹³⁶ 217 Wis. 94, 258 N.W. 324 (1935).

¹³⁷ *Estate of Robinson*, *supra* note 135, at 209.

¹³⁸ 249 Wis. 476, 24 N.W. 2d 893 (1946).

are appropriate and essential to make and maintain some part thereof as a home where elderly people may go to live for the purpose and under the conditions stated in the will." The testator's restriction that the funds be used for no other purpose than that originally specified was not allowed to defeat this slight deviation from the terms of the trust.¹³⁹

The court in the *Fairbanks* case commented that the doctrine of cy pres was not applicable to the *Nelson* case because there was no general charitable purpose present. In comparison, it is difficult to see where a bequest towards the establishment of the "Madison Lutheran Hospital and Sanitorium at Madison" is devoid of a general charitable purpose while the bequest "for the erection and maintenance of an Old People's Home in the City of Appleton" is held to demonstrate charitable intent. The court in the *Fairbanks* case based this conclusion upon the fact that in the *Nelson* case the donation was made under a subscription contract expressing the specific intention and containing restrictive conditions. It is difficult to reconcile these two cases on their analysis of whether or not a general charitable intent does exist, but nevertheless, they are valuable for their exposition of the requirements prerequisite for the application of cy pres in Wisconsin.

In the more recent case of *Saletri v. Clark*,¹⁴⁰ the Wisconsin Supreme Court, by way of dicta, reaffirmed the principles of the doctrine of cy pres in Wisconsin. After quoting from the *Nelson* case and city *First Wisconsin Trust Company v. Board of Trustees*, supra, the court concluded:

When the doctrine is applicable, it enables a court of equity to carry out the charitable purpose of the donor in a way consistent with the donor's intent, although the method he chose cannot be followed. Sooner than to permit a charitable trust to fail, it is the duty of the court to apply the property to a purpose which approximates as nearly as possible the purpose to which the donor intended it to be applied. Very briefly stated, when a charitable purpose cannot be fulfilled according to its terms, equity will attempt to do the next best similar charitable thing. This is the doctrine of cy pres.¹⁴¹

Bringing the historical analysis of Wisconsin cases dealing with the doctrine of cy pres up to date is the most recent case of *Estate of Bletch*.¹⁴² This case, 42 years after the *Tharp* case, for the first time clears the air as to any doubts which might still be lingering as to the availability of cy pres in Wisconsin due to the anomalous

¹³⁹ RESTATEMENT (SECOND), TRUSTS, §399, comment c (1959) was quoted in the opinion.

¹⁴⁰ 13 Wis. 2d 325, 108 N.W. 2d 548 (1960).

¹⁴¹ *Id.* at 328, 329.

¹⁴² *Bletch*, supra note 116.

conclusion of the *Tharp* case that "In our state the doctrine of cy pres does not obtain."¹⁴³ In the *Bletch* case the testator left his estate to the "Masonic Home for Crippled Children in the State of Illinois." Upon investigation it was discovered that no such entity existed. The trial court found that there was a distinct charitable purpose on the part of the testator and by applying the doctrine of cy pres held that the gift be directed to the Shriner's Hospital for Crippled Children located in Chicago which conducted operations closely reflecting the intent of the testator. The court recognized the confusion which had existed due to the failure of the courts to distinguish between the judicial and prerogative powers of cy pres and that what had really been rejected in the prior cases was the prerogative power. At long last the overdue coup de grace was administered to the *Tharp* decision:

We do not believe that a bequest to a charity must fail when those purposes are clearly evidenced and there is in existence an identifiable beneficiary whose charitable or public program and goals are reasonably close to those expressed by or attributable to the testator. We expressly withdraw the statement quoted above from the *Tharp Case*; we also consider as no longer controlling those cases which reject cy pres as applied to charitable bequests.¹⁴⁴

CONCLUSION

From the foregoing analysis of the Wisconsin cases dealing with charitable trusts it may be concluded that Wisconsin has traveled full circle from its early position of hostility towards charitable trusts and categorical rejection of the doctrine of cy pres to its present attitude of extending special treatment to charitable trusts so that they may be sustained and continued whenever possible. In light of the ambiguous statement by the court in the *First Wisconsin Trust Company* case it is not possible to conclusively state that the requirements of certainty applicable to private trusts set forth in section 231.11(5) are no longer applicable to charitable trusts. But, the opinions of the court in the *Harrington* and *Kavanaugh* cases would lend support to such a contention.

The special treatment of charitable trusts also includes, and this is most important insofar as this comment is concerned, the availability of the doctrine of judicial cy pres as codified by Wisconsin Statutes section 231.11(7)(c) and (d).

Although it is clear that Wisconsin is now using the judicial power of cy pres, it can only be assumed that the court is following the three step process set forth by Scott for determining if the bequest qualifies for the application of the doctrine. The court has not yet as of this date overtly analyzed any bequest as satisfying or not satisfying the

¹⁴³ *Tharp v. Seventh Day Adventist Church*, *supra* note 112.

¹⁴⁴ *Bletch*, *supra* note 116, at 48.

test of *all three* of these steps. But, from an examination of all the cases as a whole it is quite clear that all three tests must be satisfied before the Wisconsin court will act.

The extent of the doctrine of cy pres now available would appear to be co-extensive with the classical doctrine of cy pres as applied by the courts of equity in England. But, as of this date the Wisconsin doctrine does not yet extend to one important class of bequests which the modern doctrine of cy pres in the United States does cover. This is the gift "to charity"¹⁴⁵ without any indication of the specific charitable purpose to be benefited nor the mode of affecting the trust. As indicated in this comment, this situation does not technically satisfy the three step test for the application of the doctrine of judicial cy pres, but the doctrine is used in a number of jurisdictions to sustain such a bequest. Also, as noted, such a bequest might be sustained by a liberal use of the common law doctrine or inherent powers of the courts of equity without resort to the use of cy pres. Whether the Wisconsin courts will in the future sustain a bequest "to charity" by the use of cy pres or by a liberal use of the inherent powers of the court of equity or whether the legislature will intervene to render such bequests valid is not known, but it is clear that public policy dictates that such bequests should be sustained.

LEE J. GERONIME

¹⁴⁵ Such a bequest has been sustained where devised in trust with the appointed trustee given the power to designate the particular charity to be benefited. See will of Monaghan, *supra* note 111. See also Estate of Raulf, — Wis. 2d —, 137 N.W. 2d 416 (1965).